PUBLIC PROSECUTOR

v.

SHEE CHIN WAH

HIGH COURT MALAYA, MELAKA
SURIYADI HALIM OMAR J
[CRIMINAL NO: 45-1-1997]
21 OCTOBER 1997

CRIMINAL PROCEDURE: *Arrest - What constitutes arrest - Whether actual restraining of accused's liberty by actual touching of his person necessary*

CRIMINAL PROCEDURE: *Charge - Defective charge - Whether by equating cannabis with Indian Hemp charge becomes defective - Dangerous Drugs Act 1952, First Schedule - Dangerous Drug (Amendment of First Schedule) Order 1996*

EVIDENCE: *Statement - Accused's statement taken without administering caution - Whether admissible*

EVIDENCE: *Relevancy - Prejudicial evidence collected during investigation*

CRIMINAL PROCEDURE: *Close of prosecution - Standard of proof - Whether prima facie case or beyond reasonable doubt*

The accused was charged with trafficking dangerous drugs under s. 39B of the Dangerous Drugs Act 1952 ('the Act'). He was the driver and sole occupant of a car which was stopped by the police. He produced a packet of cigarettes which contained 12 rolls of cigarettes and a roll of leaves suspected to be cannabis. He was then asked to open the boot of the car where a plastic bag containing 2.7kg of cannabis was retrieved from the spare tyre compartment. It was shown during the trial that the car had been constantly hired out to third parties and that it had been returned by the last hirer only two days before the discovery of the drugs in the car. The issues which arose for determination were whether: (i) the cannabis could be equated with Indian Hemp, in which case no offence was made out; (ii) the accused's statement after the plastic bag was found that it contained cannabis and a second statement allegedly asking the police for a second chance could be construed as confessions and admitted in evidence; (iii) the accused was under arrest even though not physically touched or formally arrested by words; (iv) the accused was prejudiced by the tendering of the packet of cigarettes in evidence; and (v) the standard of proof to be applied at the close of the prosecution's case.

Held:

[1] Indian Hemp is one of the common names of cannabis in other countries and they were one and the same thing. Thus, although the description of 'cannabis (Indian Hemp) and cannabis resin (resin of Indian Hemp)' had been deleted from Part III of the First Schedule of the Act, the court was satisfied that the contents of the plastic bag were cannabis 'by whatever name the plant may be designated' as provided by s. 2 of the Act.

[2] Both statements made by the accused upon the discovery of the plastic bag in the boot of the car were inadmissible as the accused was under a constructive arrest at the time they were made and no caution had been administered.

[3] The prosecution's witness ('PW5') had admitted that he had known that an offence had been committed by the accused when he saw the cigarettes had been tampered with and that even before the first statement had been uttered by the accused, any attempt by him to flee would have resulted in his detention and in fact he had considered the accused to be under arrest. As such, there was no need for an actual restraining of the accused's liberty by actual touching of his person as there was a submission to the arrest.

[4] The discovery of the cigarettes did not in any way prejudice the court's mind in deciding whether the accused had knowledge of the drugs in the plastic bag. The drugs in the plastic bag were distinct from the contents of the cigarette packet, in content and nature, as the drugs in the cigarettes were finished products while those in the plastic bag were raw materials. Evidence which is prejudicial to the accused may be admitted where such evidence is relevant.

[5] Due to the short period of time between the return of the car and the arrest of the accused, it was probable that the accused did not have time to clear the car of any belongings left behind by the previous hirer. Moreover, it would be a little unusual for anyone to check the spare tyre compartment unless the vehicle had suffered a punctured tyre. There was also a lack of knowledge on the accused's part about the presence of the plastic bag in the car and of its contents. There was no evidence of fingerprints or nail clippings to connect the accused to the drugs.

[6] As the case against the accused was filed seven days before the amendment to the CPC came into effect on 31 January 1997, the standard of proof to be applied at the close of the prosecution case was that of beyond reasonable doubt. The evidence adduced by the prosecution was at best circumstantial and amounted to nothing more than a mere suspicion which did not even raise a *prima facie* case.

[Accused acquitted and discharged.]

Cases referred to:

Alcontara Ambross Anthony v. Public Prosecutor [1996] 1 CLJ 705 ***(cit)***
Arulpragasan Sandaraju v. Public Prosecutor [1996] 4 CLJ 597 ***(foll)***
Bahruni Ismail v. Pendakwa Raya [1997] 3 CLJ 267 ***(cit)***
Boudereau v. King [1949] SCR 262 ***(cit)***
Jayaraman & Ors v. Public Prosecutor [1982] 1 CLJ 464 ***(refd)***
Krishnan v. Public Prosecutor [1989] 2 CLJ 397 ***(foll)***
Noor Mohamed v. R [1949] 1 All ER 365 ***(foll)***
Packiam & Anor v. Public Prosecutor [1972] 1 MLJ 247 ***(foll)***
Public Prosecutor v. Aidil Ma'rof [1992] 2 CLJ 1239 ***(cit)***
Public Prosecutor v. Amir Mahmood & Ors [1996] 5 MLJ 159 ***(dist)***
Public Prosecutor v. Chan Choon Keong & Ors [1989] 2 CLJ 216 ***(cit)***
Public Prosecutor v. Kang Ho Soh [1991] 3 CLJ 2914 ***(foll)***
Public Prosecutor v. Lim Kin Ann [1988] 1 MLJ 401 ***(not foll)***
Public Prosecutor v. Md Alim Samad [1998] 1 MLJ 260 ***(refd)***
Public Prosecutor v. Lin Lian Chen [1992] 1 CLJ 2086 ***(foll)***
Public Prosecutor v. Ng Goh Weng & Anor [1979] 1 MLJ 127 ***(foll)***
Public Prosecutor v. Rosyatimah Neza & Anor [1989] 1 CLJ 481 ***(foll)***
Public Prosecutor v. Salamah bte Abdullah; Public Prosecutor v. Ong Eng Kiat [1947] MLJ 178 ***(foll)***
Public Prosecutor v. Salleh Saad [1983] 2 MLJ 164 ***(not foll)***
Public Prosecutor v. Sulaiman Mohamad Noor [1996] 1 MLJ 196 ***(dist)***
Public Prosecutor v. Tan Chye Joo & Anor [1989] 2 MLJ 253 ***(not foll)***
R v. Voisin [1918] 1 KB 531 ***(cit)***
Rozi Ramli v. Pendakwa Raya [1997] 3 CLJ Supp 479 ***(refd)***
Sambu v. Rex [1947] 13 MLJ 16 ***(foll)***
Shaaban & Ors v. Chong Fook Kam & Anor [1969] 2 MLJ 219 ***(foll)***
Tan Geok Kwang v. Public Prosecutor [1949] 15 MLJ 203 ***(foll)***
Tan Shu En & Anor v. Public Prosecutor [1948] 14 MLJ 196 ***(foll)***
Thavanathan Balasubramaniam v. Public Prosecutor [1997] 3 CLJ 150 ***(foll)***
Tong Peng Hong v. Public Prosecutor [1955] MLJ 232 ***(refd)***
Wong Yew Ming v. Public Prosecutor [1990] 2 CLJ 946 ***(foll)***

Legislation referred to:
Criminal Procedure Code (Amendment) Act 1997, s. 4
Criminal Procedure Code, ss. 15(1), 113(1)(a), (2), 180
Dangerous Drugs Act 1952, ss. 2, 37A(1), 39B, 45A(c)
Evidence Act 1950, ss. 26, 114(g)
Interpretation Acts 1948 & 1967, s. 30(b)

Other source referred to:
Trial Within A Trial, S Augustine Paul

For the accused - Teh Poh Teik; M/s Teh Poh Teik & Co

Reported by Anne Khoo

JUDGMENT

Suriyadi Halim Omar J:

In brief the prosecution's case is that on receipt of information PW5 and a police party went to Air Keroh Toll Plaza at about 3.30am. There they stopped a white Proton Wira bearing registration No. JDQ 7643 driven by the accused who was alone. He was requested to drive the car to the side and after alighting, produced a packet of cigarettes carrying the trade name of Dunhill, from which were retrieved 12 rolls of cigarettes and a roll of nipah leave which contained suspected ganja. The accused thereafter was asked to open the boot and in the spare tyre compartment was found a plastic bag, later confirmed to contain cannabis, as defined under the Dangerous Drugs Act 1952 (Act 234). At this stage the accused was supposed to have said, "itu ganja" and "bagilah saya peluang". The admissibility of these remarks were objected to by the accused on the basis that no caution was read out eventhough he was already under arrest. The prosecution subsequently charged him for trafficking 2.7 kilogram of cannabis.

The prosecution called six witnesses of whom five were formal ones with the exception of PW5 who was the raiding officer. The witnesses comprised PW4 who is the brother of the accused and who loaned that car to him, a police photographer who photographed the car and drugs, PW1 an officer from the Chemist Department who confirmed the seized items as dangerous drugs defined under the Dangerous Drugs Act 1952, PW8 the investigating officer who kept the drugs and PW7 a storekeeper who kept and maintained the records, as well as watching the movement of the drugs. The last was PW5, about the only relevant witness who suffered some intensive cross-examination by the accused's counsel.

Certain legal points cropped up during the hearing namely, whether:

1. by equating cannabis with Indian Hemp no offence was committed;
2. the statement made by the accused "itu ganja" after the plastic bag was discovered at the boot of car was admissible;
3. his follow-up remark, requesting a second chance on its own, was admissible;
4. he was already under arrest eventhough not physically touched or even told so;
5. the case of the accused was prejudiced when the packet of Dunhill with the 12 rolls of cigarettes were tendered as exhibits; and
6. what the standard of proof at the end of the prosecution's stage was ie, whether on a *prima facie* basis or beyond reasonable doubt.

Whether Equating Cannabis With Indian Hemp Has Made The Charge Defective

The charge reads:

> Bahawa kamu pada 10.1.97 jam lebih kurang jam 3.30 pagi di Plaza Tol Ayer Keroh Durian Tunggal, di dalam Daerah Alor Gajah, di dalam Negeri Melaka, telah mengedar dadah berbahaya iaitu 2624.0 gram cannabis dan dengan itu kamu telah melakukan satu kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 (Akta 234) Semakan 1980) dan boleh di hukum di bawah Seksyen 39B(2) Akta yang sama.

Perusing the charge it is crystal clear that the accused is being charged for trafficking 2624.0 gram of cannabis which according to the prosecution is a dangerous drug under the Dangerous Drugs Act 1952 (Act 234). As to the definition of dangerous drug, s. 2 of the Act defines it as "any drug or substance which is for the time being comprised in the First Schedule", with cannabis defined as "any part of any plant of the genus Cannabis from which there is found to be present resin irrespective of its quantity, and by whatever name the plant may be designated." Reading through the First Schedule one is immediately made aware that there are five parts. Part I and Part II both have the drug of cannabis in them. Historically Part III also had cannabis in it though particularised as "Cannabis (Indian Hemp) and Cannabis resin (Resin of Indian Hemp)". With effect from 12 April 1996 Part III of the First Schedule was amended by the Dangerous Drug (Amendment of First Schedule) Order 1996 by the Minister of Health, acting under s. 45A(c) of the Dangerous Drugs Act 1952 (Act 234) whereby the above "Cannabis (Indian Hemp) and

Cannabis resin (Resin of Indian Hemp)" was deleted. This deletion, unfortunately for the prosecution, resulted in many acquittals, among them being Johor Bahru High Court Trials Nos: 45-5-97 and 45-6-97 (*PP v. Md Alim bin Samad, PP v. Sulaiman bin Mohamad Noor* [1996] 1 MLJ 196 and *PP v. Amir bin Mahmood & Others* [1996] 5 MLJ 159. The reasons for the acquittals, from the reading of the cases, in brief showed that the prosecution witnesses had agreed with the defence during cross-examination that Indian Hemp was cannabis, whilst at the same time confirming that the exhibits in those cases were Indian Hemp thus prompting to hold that by virtue of cannabis/Indian Hemp having been deleted from the First Schedule no offence therefore had been committed. In the present case the accused had attempted to exploit the same technique of wanting PW1 to describe the cannabis recovered from the accused as Indian Hemp. The witness instead said "I will not describe them within brackets as Indian Hemp. Indian Hemp is one of the common names for cannabis in other countries. It means one and the same thing". He further added that Indian Hemp was not defined in any part of the Dangerous Drugs Act and described the exhibits as dangerous drugs under s. 2 of the Dangerous Drugs Act. Pressed further by the accused's counsel he did equate cannabis as Indian Hemp but qualified it as meaning cannabis or Indian Hemp as under the old schedule. Finally eventhough he viewed them to be Indian Hemp yet they were cannabis as defined in s. 2 of the Dangerous Drugs Act.

Putting his answers together and analysing them I read it to mean that:

1. Indian Hemp is one of the common names of cannabis in other countries;
2. when he admitted that cannabis and Indian Hemp were one and the same thing it was in reference to the old schedule;
3. he admitted that they were Indian Hemp. Eventhough he admitted them to be so, it must be read in relation to his earlier answer which says that Indian Hemp is one of the common names for cannabis in other countries; and
4. that those drugs marked as P10(a), P12(a), P14(a) and P19(a) were cannabis as defined in s. 2 of the Dangerous Drugs Act.

I was hard pressed to detect any questions or answers which confirmed that these cannabis viz. P10(a), P12(a), P14(a) and P19(a) were cannabis/Indian Hemp as envisaged by the previous "Cannabis (Indian Hemp) and Cannabis resin (Resin of Indian Hemp)" in Part III of the First Schedule. On that score I was unable to accept the submission of the learned counsel for the accused

that the above exhibits and their effect came within the four walls of the four Johore Bahru cases. As regards PW1 I must credit the chemist expert before me for not only being truthful but also careful. No one in his right frame of mind could chastise him for agreeing to the accused's suggestion that Indian Hemp, by virtue of its name as used by foreigners, was one and the same thing with cannabis. To say otherwise would have been an outright lie. His answers merely strengthened his credibility. As regards his answers, as I was satisfied that P10(a), P12(a), P14(a) and 19(a) "by whatever name the plant may be designated" as provided by the interpretation section were cannabis as defined under s. 2, the charge therefore was in order.

Remarks Of The Accused

As to whether the remarks "itu ganja" dan "bagilah saya peluang" were admissible in evidence, or otherwise had to depend on several legal niceties, *inter alia,* whether when the remarks were made he was under arrest or not and whether the statements were admissible confessions.

It is the law of evidence that a confession made by an accused person is irrelevant in a criminal proceeding if the making of the confession appears to the court to have been caused by any inducement, threat or promise having regard to the charge against him, proceeding from a person in authority.

This strict inhibition as regards the usage of a confession is further watered down by s. 26 of the Evidence Act 1950 which reads:

> (1) Subject to any express provision contained in any written law, no confession made by any person whilst he is in the custody of a police officer, unless it is made in the immediate presence of a President of a Sessions Court or Magistrate shall be proved as against that person.

To restate the above statutory provision, a confession is admissible, if:

1. express provision allows it (see "subject to any express provision contained in any written law ..."); and
2. the confession is made before a President of a Sessions Court or magistrate.

On the basis of this statutory permission allowing a confession to be used against the maker by virtue of the above opening words, "subject to any express provision contained in any written law ...", a statement be it a confession or not therefore becomes admissible under s. 37A(1) of the Dangerous Drugs Act 1952 (Act 234) as this Act is a written law (*Public Prosecutor v. Ng Goh Weng & Anor* [1979] 1 MLJ 127 at p. 128). Section 37A(1) reads:

> Where any person is charged with any offence against this Act any statement, whether such statement amounts to a confession or not ... shall notwithstanding anything to the contrary in any written law, be admissible at his trial in evidence and ...
>
> Provided that no such statement shall be admissible or used as aforesaid:
>
> (a) ...
>
> (b) in the case of a statement made by such person after his arrest, unless the court is satisfied that a caution was administered ...

At this juncture I will jump into the affray and say that the above portion is in *pari materia* with s. 113(1)(a)(2) of the Criminal Procedure Code. It is well established in law that for a statement to be admissible certain conditions must be complied with, among them the voluntariness of that statement (see *Public Prosecutor v. Kang Ho Soh* [1991] 3 CLJ 2914 at 2917; *Public Prosecutor v. Aidil bin Ma'rof* [1992] 2 CLJ 1239). It is also established that before a ruling on the voluntariness of a statement is made the prosecution must beforehand have read out the caution to the accused (*Public Prosecutor v. Chan Choon Keong & Ors* [1989] 2 MLJ 427; *Trial Within A Trial* by S Augustine Paul).

In brief that is the scenario and treatment to be meted out to statements desired to be used by the prosecution, as against an accused person, after his arrest. What then is the status of a statement or confession made by an accused person if no arrest had taken place? It is now trite law that if a statement is made by a person before any arrest is effected on him, and no caution has been read out to him, so long as that statement was not caused by any inducement, threat or promise having reference to the charge against him, such statement may be relevant and admissible as against him. The omission of the caution in appropriate cases may merely go toward the voluntariness of the statement (see *Boudereau v. King* [1949] SCR 262; *R v. Voisin* [1918] 1 KB 531 at 537/538; *Trial Within A Trial* by S Augustine Paul). In the present case the prosecution had attempted to introduce the statements of the accused made prior to the discovery of the drugs at the compartment of the spare tyre, but objected to, on the basis that when the remarks were made he already was under arrest and with no caution thereafter read out to him. Not unexpectedly the learned Deputy Public Prosecutor vehemently denied such arrest. That being so there was a necessity on my part to scrutinise the facts and conclude whether he was in fact arrested before deciding whether to admit the statements or otherwise.

At the risk of repeating the facts, but necessary to resolve this matter, the accused after alighting from the car had produced a Dunhill packet (P16), which contained 12 sticks of cigarettes and a roll of nipah leaf (P17A-L and P20). PW5 suspected immediately that the cigarettes contained cannabis when he realised that the cigarettes had been tampered with. He knew by then that an offence had been committed by the accused. With that perception in mind he then went to the rear of the car, had the boot opened and then saw a plastic bag. He thereafter asked the accused what it was, and it was at this juncture that the hotly contested answer was given. PW5 admitted on cross-examination, that even before this statement was uttered by the accused, any attempt by him to flee would have resulted in his detention. In fact he had considered the accused to be under arrest. Things became slightly muddled when during the re-examination stage he clarified that his perception of the accused being under arrest took form only after he obtained the answer as to the contents of the plastic bag from the accused. It then became encumbent upon me to sift the evidence and to decide whether in actuality he was deliberately tailoring his answers toward a successful prosecution or was confused at the cross-examination stage. On a finding of fact I was satisfied that PW5 had suspected that the accused had committed an offence when found in possession of the 12 rolls of cigarettes suspected of containing ganja. At that point of time even before the plastic bag was discovered, in his view the accused was already under arrest. I was also convinced that the police would have used all the necessary force to restrain him if he had attempted to flee. Similarly I was satisfied that it would have been suicidal for the accused to attempt to escape when he was surrounded by a party of armed policemen. The only snag to the whole scenario was the fact that the accused was never detained physically eg, by handcuffing him or told in so many words that he was under arrest. Not surprisingly the learned counsel for the accused exploited the perception of the police officer whilst the learned Deputy Public Prosecutor derided that perception by regurgitating cases which required some physical restraint before a person was construed to be under arrest.

The relevant provision with regard to arrest is s. 15 of the Criminal Procedure Code and it reads:

> 15(1) In making an arrest the police officer or other person making the same shall actually touch or confine the body of the person to be arrested unless there be a submission to the custody by word or action.

A simple reading of the above provision will impress any reader that some restraining of the liberty of the person by certain acts, physical or otherwise is required, which will immobilise him although actual arrest will become unnecessary, if there is submission to the arrestor. In *Shaaban & Ors v. Chong Fook Kam & Anor*. [1969] 2 MLJ 219 at p. 220 Lord Delvin said:

> An arrest occurs when a police officer states in terms that he is arresting or when he uses force to restrain the individual concerned. It occurs also when by words or conduct he makes it clear that he will, if necessary, use force to prevent the individual from going where he may want to go. It does not occur when he stops an individual to make inquiries.

By virtue of attempts by jurists to interpret the meaning of arrest, two schools of thought have germinated, one requiring actual arrest whilst the other sufficiently satisfied if a person is already in a state of being watched or guarded to prevent his escape. As for the latter view, the issue of whether in a particular case a person was under arrest at a given moment of time, is a question of fact to be decided according to the facts of each case. To mention a few cases, this view is clearly reflected in *Sambu v. Rex* [1947] 13 MLJ 16, *Public Prosecutor v. Salamah binte Abdullah* and *Public Prosecutor v. Ong Eng Kiat* [1947] 13 MLJ 178 and *Tan Shu En and Another v. Public Prosecutor* [1948] 14 MLJ 196. In the classic case of *Jayaraman & Ors v. Public Prosecutor* [1982] 2 MLJ 306 the court was of the view that mere inquiries or even a request "not to leave the compound of the temple" did not tantamount to having the accused being already under arrest. In other words something extra was required for a person to be considered as to be under arrest. With the advent of *Public Prosecutor v. Salleh bin Saad* [1983] 2 MLJ 164 the mood swung to actual arrest and not constructive arrest. This case was strongly supported by *Public Prosecutor v. Lim Kin Ann* [1988] 1 MLJ 401 and *Public Prosecutor v. Tan Chye Joo & Anor* [1989] 2 MLJ 253.

The case of *Krishnan v. Public Prosecutor* [1987] 1 MLJ 292 saw an interesting development in the law when their Lordships in the Supreme Court enunciated that the accused was already under arrest when he was being pursued to his house by the police. Wan Adnan J (as he then was) in *Tan Chye Joo (supra)* eventhough after *Krishnan,* distinguished the facts of *Krishnan (supra)* with that of the case before him by alluding to the remarks of the police witness and the lack of evidence to show that there was an attempt by the arrestee to escape.

Peh Swee Chin J (as he then was) in *Public Prosecutor v. Rosyatimah bte Neza & Anor* [1989] 1 MLJ 360 created a ripple again when His Lordship endorsed the constructive arrest concept, and at the same time adding that a person was under arrest if "from the circumstances it can be implied that his personal liberty has been restrained". Three years later the issue of arrest made its appearance again in *Public Prosecutor v. Kang Ho Soh* [1991] 3 CLJ 2914 when His Lordship Mahadev Shankar J (as he then was) said at p. 2917:

> But whether in a particular case a person was under actual arrest at a given moment of time is a question of fact, to be decided according to the circumstances of each case.

Having considered the relevant views of those eminent judges I found myself to be in complete agreement with the view of Mahadev Shankar J not only due to its sensibleness and pragmatism but is in full consonent with the statutory provision.

If a person could be construed as being under arrest eventhough still being pursued then a person whose movements have been immobilised so to speak, either by the physical presence of the police or incapacitated by fear of injury to his person, surely must mean that he, beyond all doubt has been arrested. Actual arrest is the perfect situation where the requirements of s. 15 of the Criminal Procedure Code are adhered to, after the needful has been completed during the investigation. As in this case if the police had physically arrested him, entailing handcuffing him, such an act would have hampered the investigation as the accused was still required to personally open the boot of the car and to retrieve any incriminating merchandise if necessary. Since he had been found in possession of 12 rolls of cigarettes suspected to contain cannabis, with the police not wanting to hamper his movements as his assistance was still required, compounded further by the view of PW5 that he had considered the accused to be under arrest, how could I decide that the accused was not under arrest.

That being so, with no caution forthcoming, his statements therefore were inadmissible, be it "itu ganja" or "bagilah saya peluang", as they were from one transaction and uttered consecutively.

On the assumption that PW5 had not noticed the drugs in the packet of Dunhill would the facts permit me to conclude that he was under arrest? Scrutinising the facts it was obvious that he did ask the accused to drive the car to the side of the main road and at that instance the latter could have just sped off leaving the police party helpless and feeling foolish. But as it were he proceeded to obey the instructions of PW5 and thereafter alighting. One must bear in mind that PW5 and the police party went to the Air Keroh Toll Plaza pursuant to some information oblivious of the outcome. No evidence was adduced by the prosecution let alone being suggested by the accused that (the attempt to adduce prejudicial evidence by method of "putting it to you" was withdrawn):

1. the accused was the target;
2. there were drugs in the targeted car;
3. that the car targetted will bear the registration No. JDQ 7643; and
4. that the drugs will be at the boot with the knowledge of the accused (*Alcontara a/l Ambross Anthony v. Public Prosecutor* [1996] 1 MLJ 209 at 220 paras H-I and 221 paras A-G).

I could not permit myself to go beyond the borders of the facts adduced by PW5 but to accept at face value the neutral evidence of the police having gone there on information received. I had to proceed on the basis that he went there without a prejudiced mind and as providence wants it, successful in recovering a large amount of drugs and thereafter arrested the accused. On that understanding, the discovery of the drugs in the plastic bag, would be pursuant to a routine check. Proceeding on those facts the only reasonable conclusion that I could arrive at was that if the cigarettes were not found on him, I would not have considered him to be under arrest and therefore any incriminating remarks made by the accused would have been admissible. The discovery of the 12 rolls of cigarettes suspected of containing cannabis made all the difference. The recovery of the drugs in the plastic bag had also upgraded the accused, by a quantum leap, from a mere user to that of a potential trafficker in the eyes of the prosecution.

This circuitous or comparative method merely confirmed the direct evidence produced by the prosecution that the discovery of the drugs on him resulted in the statements becoming inadmissible.

Tendering The Packet Of Cigarettes

The learned counsel for the accused had indicated his objections pertaining the tendering of the packet of Dunhill with the tampered cigarettes, on the basis that they were not part of the charge and therefore prejudicial to the accused. Interestingly enough, this argument bites both ways in that if the cigarettes were non-existent or disallowed to be tendered the accused would lose his protection as without that intervening factor, his incriminating statements could have been admissible. In a nutshell, the strength of the prosecution's evidence was tremendously reduced by the introduction of these cigarettes. Now the accused ironically has objected to them being tendered. Despite my sympathy with the intention of the counsel, the court's concern is merely to act as a referee and ensure that the tenets of law are complied with fully, regardless of the course of action of the accused (see *Packiam & Anor v. Public Prosecutor* [1972] 1 MLJ 247).

As far as the prosecution was concerned I could well imagine that there was a real fear on their part of the invocation of s. 114(g) of the Evidence Act if the drugs were not included as part of the prosecution's exhibits hence that course of action. Eventhough the prosecution had not combined those drugs with that found in the plastic bag, nothing negative should be read into that, as that was their choice. Weight wise, the amount of drugs from the cigarettes if added to the main drugs, would not have made much difference to the presumption section as they were already above the statutory amount.

I had no problems in separating the drugs in the plastic bags with that of the contents of the cigarette packet as a totally different set of consideration was applied by me. Admittedly there were found drugs on the body of the accused but the shape, content, type and structure of the two sets of drugs were totally different. The drugs found on his body were finished products which merely required lighting and inhaling whilst that at the boot entailed further tearing, wrapping, decompressing, turning them into fine products similar to that found in the cigarette rolls, marketing and eventually to be consumed by the consumer. In other words the drugs found at the boot had a long journey to go before eventually reaching the stage of the cigarettes. These factors taken into account show the vast intrinsic difference between the two sets of drugs and the dimension to be considered let alone the source. I must at the outset clear any doubt that merely by having a small amount of drugs on his body it thus could be implied that he must have known of the drugs in the boot of the car. I must also make it clear in no uncertain terms that the discovery of the drugs on his body did not in any way prejudice my mind enroute to deciding whether the accused had knowledge of the drugs in the car boot or otherwise. In an indirect fashion, the accused is deprived of the ground that the prejudicial effect of that evidence ie, the ganja found on his body, outweighed its probative value.

At the end of the day what counts is that the considerations applicable for the two sets of drugs were totally at variance. It was canvassed by Encik Anselm, the learned Deputy Public Prosecutor, a stance which I am in total agreement, that other evidence may be admitted although prejudicial to the accused. In the case of *Wong Yew Ming v. Public Prosecutor* [1991] 1 MLJ 31 the following question of law of public interest was posed before the Supreme Court, ie,:

> Whether in a trial in which an accused is charged for trafficking in respect of a particular quantity of dangerous drug, to wit, heroin, at a particular place and time, evidence may be admitted that on previous occasions he had sold dangerous drugs, although such evidence is prejudicial to the accused.

Their Lordships answered the question in the affirmative as that additional evidence was relevant to show knowledge and that the possession of the drugs was not accidental. Apart from this case the learned Deputy Public Prosecutor also adverted to the case of *Thavanathan Balasubramaniam v. Public Prosecutor* [1997] 3 CLJ 150 for my consideration. The question brought for determination before the Federal Court was whether it was open to the appellate judge to analyse, comment and take into account the evidence adduced on a charge of which an accused person had been acquitted to support

his conviction on a second remaining charge. Their Lordships in the Federal Court, in answer to the legal poser, viewed it positively on the basis of relevancy. Chong Siew Fai CJ (Sabah and Sarawak) opined:

> Therefore, on the question of general nature as raised and in the context of the case presently under reference without pinpointing to any particular piece of evidence, it is our view that the answers in the affirmative provided the evidence on the charge of soliciting is properly admissible on the trial of the charge of accepting, and it is so admissible if it satisfies the law of evidence relating to relevancy which, in our present context, are principally ss. 5, 6, 7, 8 and 9 of the Evidence Act 1950 (ie, briefly, if the evidence constitutes facts in issue, or if the evidence constitutes collateral facts which (i) form part of the same transaction, or (ii) are the immediate occasion, cause, or effect of fact in issue, or (iii) show motive, preparation, or conduct affected by a fact in issue, or (iv) are necessary to be known in order to introduce or explain some relevant fact) unless the exclusionary rules eg, rules relating to hearsay apply.

Clearly the factor of relevancy has taken the front seat; but then their Lordships did say that it was "... in the context of the case presently under reference." Aided by all those relevant considerations, without being arbitrary or capricious I applied my discretion and permitted those cigarettes to be tendered (see *Tan Geok Kwang v. Public Prosecutor* [1949] 15 MLJ 203; *Noor Mohamed v. R* [1949] 1 All ER 365.

Prima Facie Or Beyond Reasonable Doubt

Under the law as provided by the amended Criminal Procedure Code, all that the prosecution needs to prove is a *prima facie* case which is worlds apart to that of a beyond reasonable doubt test.

The accused had canvassed that the burden of proof is that of beyond reasonable doubt and not *prima facie* as he was arrested before Act A979 was promulgated. This Amendment Act comes into effect as of 31 January 1997. By virtue of s. 4 of this Amendment Act, s. 180 of the Criminal Procedure Code was comprehensively amended resulting in the view of the Federal Court in the case of *Arulpragasan a/l Sandaraju v. Public Prosecutor (infra)* becoming inoperable. In that case of *Arulpragasan a/l Sandaraju v. Public Prosecutor* [1996] 4 CLJ 597 at 613 His Lordship Eusoff Chin CJ opined:

> It is trite law that the onus is on the prosecution throughout the case in any criminal trial to prove the charge against the accused beyond reasonable doubt. In my view, the same standard of proof applies at the intermediate stage of the trial, ie, at the close of the prosecution.

The amended s. 180 in unambiguous terms provides that for criminal cases in the High Court, after the prosecution case is concluded, the court shall consider whether the prosecution has made out a *prima facie* case (see *Rozi bin Ramli v. Pendakwa Raya* [1997] 3 CLJ Supp 479. The issue of burden of proof was put to the test when Mr. Teh Poh Teik ventilated that the level of proof should be based on a beyond reasonable doubt basis rather than that of *prima facie.* The only reason for this assertion by him was due to the fact that the accused was arrested on 10 January 1997 whilst the effective date of the amended section was 31 January 1997. On further perusal of the charge sheet and the available documentation, I found that the accused made his first appearance in court on 24 January 1997 ie, seven days before Act A979 came into effect. In the case of *Bahruni bin Ismail v. Pendakwa Raya* [1997] 2 MLJ 265 the Federal Court at p. 270 said:

> While we appreciate that s. 180 of the CPC has now been amended to provide for a *prima facie* standard of proof at the close of the case for the prosecution, it cannot be gainsaid that that amendment has no retrospective effect. There is nothing in the amendment itself to even suggest this. Therefore, it is never in doubt that Parliament in its wisdom has not made it retrospective. Both the learned DPP and the learned counsel for the appellant conceded this. Therefore, the amendment having been gazetted on 30 January 1997 would for all practical purposes come into effect only on 31 January 1997. Thus, the amendment would only be applicable to cases filed after that date and not to cases before that date and this would include decided cases pending appeal. In all cases before 31 January 1997, the beyond a reasonable doubt standard of proof must of necessity apply as all along there can be only one interpretation of s. 180 of the CPC, and that is as decided by the majority decision in Arulpragasan. (emphasis supplied)

Two relevant points of law directly in point for the present case, have emanated from the above paragraph namely that:

1. by this pronouncement all cases filed before 31 January 1997 at the prosecution's stage must be assessed on a basis of a standard of proof of beyond reasonable doubt; and

2. the relevant words are "filed after that date" governs the standard of proof. Thankfully s. 30(b) of the Interpretation Act (Act 388) which promulgates that under this provision the right of the accused, ie, the vested right to a standard of proof of beyond reasonable doubt, is unaffected by any repeal of a written law in whole or in part was not put to the test. This is so as the case against the accused was filed seven days before the amendments came into effect.

On the above interpretation the present case must be judged at the prosecution stage on the beyond reasonable doubt standard basis as decided by *Arulpragasan.*

To regurgitate on the evidence:

1. His presence at 3.30am at the Air Keroh Tol Plaza. His presence at such an unholy hour of the morning at the Air Keroh Tol Plaza when any sensible person would be safely tucked under his blanket should not be taken against him. At best it is unusual, but to liken being out very early in the morning to criminality, would rope in anyone working on night shifts, persons returning from karaokes or even anyone returning home from religious classes.

2. The hiring of the vehicle. It is a fact that the car was constantly being hired out, and by cross-referring to the date printed on the newspaper which was 8 March 1997, it must have been last hired out two days before the arrest. The fact that the vehicle was rented out often must be taken for a fact as it was confirmed by a prosecution witness ie, the brother of the accused. There was absolutely no evidence that the newspaper was bought by the accused and since it could also have been bought by the hirer the most favourable inference must be given to the accused. That being so that car must have been last rented out to the last hirer who bought that Chinese newspaper ie, on 8 March 1997. He must have thereafter used that newspaper as a wrapper and eventually left the dangerous items at the boot of the car.

   Why he did not take it back is not for the accused to explain. There could be a thousand and one reasons for it.

3. The short span of time from the day the vehicle was returned until the day he was arrested. Due to the short period of two days, it is probable that the accused did not have time to clear the car of any belongings left by the previous hirer. Moreover it would be a bit unusual for anybody to even browse let alone lift the spare tyre compartment cover unless the vehicle had suffered a punctured tyre earlier.

4. Lack of evidence of knowledge on the part of the accused regarding the presence of the plastic bag in the vehicle. The cross-examination of the accused suggesting that he was aware of the plastic bag and was returning to the owner that plastic bag should not be used to complement or strengthen the glaring weaknesses of the prosecution's case. The prosecution must also be aware that the suggestions advanced by the counsel are mere unsubstantiated allegations that do not qualify as evidence as they were not adduced by the accused. They were mere

suggestions from the Bar table. This advancing of such a defence at the prosecution's stage through the cross-examinations also was to avoid any assertion that that defence was an afterthought.

5. Lack of knowledge of the contents. Absolutely no direct evidence was adduced by the prosecution to show that the accused was aware of the contents. In fact even if he had known of the existence of that plastic bag that does not imply that he knew the contents. The prosecution must prove the latter factor beyond reasonable doubt.

6. Conduct of the accused. Touching on the conduct of the accused on that fateful night, PW5 said that prior to the recovery of the plastic bag, the behaviour of the accused was "gentlemanly". It must have meant that the accused was oblivious to any incriminating matter in the car and hence that profile. Even if he had shown apprehension, that outward appearance could also be construed as surprise followed by uncertainty, spiced with a tinge of fear that due to what was left behind by the hirer he was in for a nasty time with the local constabulary.

7. The sole occupancy of the car by the accused. Similar to the case of *Public Prosecutor v. Lin Lian Chen* [1992] 2 MLJ 561, the introduction of evidence showing that the accused was the sole occupant of the car (a car also owned by another person), was of no assistance to the prosecution either. In the above case the accused who was the sole occupant of the car was also arrested for being in possession of drugs. The law Lords saw nothing wrong being alone in a car. As in *Lin Lian Chen*, the drugs were not recovered from a specially constructed compartment and therefore the presumption under s. 37(h) did not apply. The car also was not "anything whatsoever containing any dangerous drug" and therefore attracted no presumption as per 37(h) (see also *Tong Peng Hong v. Public Prosecutor* [1955] MLJ 232).

8. No fingerprints taken or nails clipped to trace the presence of drugs. This is a factual shortcoming which was also discussed in the above precedent. No evidence was adduced to show that the plastic bag or anything in it had been dusted for fingerprints. Similarly no evidence of the accused's hands or fingernail clippings were examined for traces of cannabis.

In this case no presumption provisions have come to the rescue of the prosecution, and therefore the latter is only left with direct evidence. Unfortunately even that direct evidence is not available to the prosecution and consequently has relied on circumstantial evidence which at best in this case is minimum. If I may quote Edgar Joseph SCJ in *Public Prosecutor v. Lin Lian Chen (supra)* His Lordship said:

> It is trite law that where the prosecution is relying on circumstantial evidence the onus upon it is a very heavy one and that evidence must point irresistibly to the guilt of the accused. If there are gaps in it then that will not be sufficient (per Pike CJ in *Chang Kim Siong v. PP*).

With the standard of proof required of the prosecution being that of beyond reasonable doubt I am not convinced that that level has been attained. In fact I am not even convinced that a *prima facie* case had been proven as the inclination of the evidence adduced amounted to nothing more than mere suspicion. That certainly is inadequate for me to call the defence and I therefore acquit and discharge the accused.